Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1878

In the Supreme Court of the United States

OCTOBER TERM, 1990

MARK REITER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether petitioner's due process rights were violated because five defense witnesses were not granted use immunity.

2. Whether the district court erred in excluding opinion testimony interpreting intercepted conversations that had not been introduced into evidence.

3. Whether the district court properly denied petitioner's request for additional copies of certain tape-recorded conversations.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Autry v. *Estelle*, 706 F.2d 1394 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984)	6
Daley, In re, 549 F.2d 469 (7th Cir.), cert. denied, 434 U.S. 829 (1977)	7
Government of the Virgin Islands v. *Smith*, 615 F.2d 964 (3d Cir. 1980)	5, 6
Mattheson v. *King*, 751 F.2d 1432 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986)	6
People v. *Adams*, 53 N.Y.2d 241, 440 N.Y.2d 902, 423 N.E.2d 379 (1981)	8
People v. *Chin*, 67 N.Y.2d 22, 499 N.Y.S.2d 638, 490 N.E.2d 505 (1986)	8
People v. *Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250, 472 N.E.2d 26 (1984)	8
Pillsbury Co. v. *Conboy*, 459 U.S. 248 (1983)	6
United States v. *Alessio*, 528 F.2d 1079 (9th Cir.), cert. denied, 426 U.S. 948 (1976)	7
United States v. *Angiulo*, 897 F.2d 1169 (1st Cir. 1990), petition for cert. pending, No. 90-10	8
United States v. *Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976)	7
United States v. *Capozzi*, 883 F.2d 608 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990)	7, 8
United States v. *D'Apice*, 664 F.2d 75 (5th Cir. 1981)	7
United States v. *Eagle Hawk*, 815 F.2d 1213 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988)	7
United States v. *Graham*, 548 F.2d 1302 (8th Cir. 1977)	7

Cases—Continued: Page

United States v. *Hardrich*, 707 F.2d 992 (8th Cir.), cert. denied, 464 U.S. 991 (1983) 7
United States v. *Heffington*, 682 F.2d 1075 (5th Cir. 1982), cert. denied, 459 U.S. 1108 (1983) 6
United States v. *Hooks*, 848 F.2d 785 (7th Cir. 1988) 6-7, 8
United States v. *Karas*, 624 F.2d 500 (4th Cir. 1980), cert. denied, 449 U.S. 1078 (1981) 7
United States v. *Lenz*, 616 F.2d 960 (6th Cir.), cert. denied, 447 U.S. 929 (1980) 7
United States v. *Pennell*, 737 F.2d 521 (6th Cir. 1964), cert. denied, 469 U.S. 1158 (1985) 6
United States v. *Thevis*, 665 F.2d 616 (5th Cir.), cert. denied, 456 U.S. 1008 (1982) 7
United States v. *Turkish*, 623 F.2d 769 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981) 7, 8

Statutes and rule:

Immunity of Witnesses Act, 18 U.S.C. 6001 *et seq.*... 5, 6
18 U.S.C. 371 2
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
21 U.S.C. 841 2
21 U.S.C. 843(b) 2
21 U.S.C. 848(a) 2
Sup. Ct. R. 13.4 1

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-1878

MARK REITER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 897 F.2d 639.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 1990. A petition for rehearing filed by the United States was denied on May 4, 1990.[1]

---

[1] The government filed a rehearing petition seeking reconsideration of the reversal of the conviction of petitioner's co-defendant, Leonard Rollack. Neither petitioner nor the government sought further review of the judgment against petitioner in the court of appeals. Pursuant to Rule 13.4 of the Rules of this Court, however, a rehearing petition filed by "any party" tolls the time in which to file a petition for a writ of certiorari for all parties.

Pet. App. A17. The petition for a writ of certiorari was filed on May 31, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of participating in the affairs of an enterprise through a pattern of racketeering activity (RICO) (Count 1), in violation of 18 U.S.C. 1962(c); RICO conspiracy (Count 2), in violation of 18 U.S.C. 1962(d); operating a continuing criminal narcotics enterprise (CCE) (Count 3), in violation of 21 U.S.C. 848(a); distributing heroin (Counts 5 and 6), in violation of 21 U.S.C. 841; using a telephone to facilitate the commission of a narcotics felony (Count 7), in violation of 21 U.S.C. 843(b); and conspiring to impede and obstruct the Internal Revenue Service in the collection of taxes (Count 13), in violation of 18 U.S.C. 371. The district court sentenced petitioner to life imprisonment without parole on Counts 3 and 5. On the remaining counts, the court imposed consecutive terms totalling 60 years' imprisonment, to be followed by a lifetime term of special parole. Petitioner was also fined a total of $4 million.

1. Briefly summarized, the evidence at the four-month trial showed that petitioner was a major supplier of heroin. He employed several men who stored, cut, and packaged heroin and distributed it to petitioner's clients. Gov't C.A. Br. 30-38. Among those clients was a racketeering enterprise operated by Eugene Romero and James Jackson. Between 1980 and 1987, petitioner distributed approximately 45 kilograms of pure heroin worth more than $10 million to Romero and Jackson. *Id.* at 6-20.

Petitioner's initial contact person in the Romero-Jackson organization was Steven Ash. After Ash fell behind in his payments to petitioner by approximately $100,000, petitioner met with Romero and Jackson and asked to have Ash replaced as his contact; thereafter, petitioner worked directly with Romero. Petitioner subsequently learned that the boyfriend of Ash's sister was cooperating with the government. Petitioner told Jackson and Romero that he feared that Ash and his sister would also cooperate, and he instructed Jackson and Romero "to get rid of them." Gov't C.A. Br. 17. Petitioner's instructions were carried out; both Ash and his sister were shot and killed. *Id.* at 18-20.

Although petitioner sold his heroin for as much as $240,000 per kilogram, he reported little or no income to the IRS between 1980 and 1987. He lived lavishly, however. Petitioner rented a Manhattan apartment, owned a house in Merrick, New York, and owned or leased a number of luxury cars and expensive boats. Gov't C.A. Br. 40-43.

2. a. Petitioner called 23 witnesses in his own behalf. Gov't C.A. Br. 23. He also asked the district court to direct the government to grant use immunity to five of his criminal accomplices, including Romero. The district court refused to do so on the ground that each was an actual or potential target of prosecution. *Id.* at 140-145.

b. During its investigation, the government conducted court-authorized electronic surveillance of two telephone lines in petitioner's Manhattan apartment. Each conversation was simultaneously recorded in triplicate. One set of tapes was sealed and preserved for possible use at trial. The other two sets were used to make copies for the parties. Prior to trial, the government gave petitioner a copy of the wire-

tap log sheets that were made contemporaneously during the surveillance. For each call, the log sheets gave the time, the date, the identification of the parties, and a brief description of the conversation. Petitioner also received a copy of all the intercepted conversations, which had been made from the unsealed tapes. During the trial, petitioner contended that one of the tapes he had received was blank, and that the log for that tape indicated that it should have contained conversations. The government made a new copy of that tape for petitioner. However, the government refused petitioner's request to unseal all of the tapes that had been sealed and provide a new copy of all the intercepted conversations from those tapes. The government resisted that request on the ground that it was unnecessary and burdensome. The district court upheld the government's refusal to make a whole new copy of all the intercepted conversations from the sealed tapes. Gov't C.A. Br. 101-114.

c. At trial, Edward Seidlick, a private investigator, testified for petitioner as an expert in electronic surveillance. After Seidlick gave his opinion as to the meaning of conversations recorded on the tapes that the government had introduced into evidence, petitioner sought to question Seidlick about other tapes that had not been introduced. The district court ruled that petitioner had failed to proffer a theory under which either the additional tapes or Seidlick's testimony concerning those tapes could be admitted. Gov't C.A. Br. 108-110.

3. The court of appeals found petitioner's claims that he had been unfairly restricted in presenting his defense to be "without merit," and affirmed his convictions. Pet. App. A16.

ARGUMENT

1. Petitioner first contends (Pet. 10-15) that the failure of the district court to order the government to grant use immunity, pursuant to 18 U.S.C. 6001 *et seq.*, to five prospective defense witnesses violated his right to due process. The government declined to grant use immunity to the five witnesses because each was an actual or potential target of prosecution. Gov't C.A. Br. 140-145.

In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 966 (1980), the Third Circuit stated that a due process violation would be found "where government actions denying use immunity to defense witnesses were undertaken with the 'deliberate intention of distorting the judicial fact finding process.'" Although petitioner relies heavily on the *Smith* case, that case is readily distinguishable from this one. The district court correctly concluded in this case that the government was not attempting to distort the fact finding process, but was legitimately unwilling to grant immunity to petitioner's witnesses because each was an actual or potential target of a criminal prosecution.[2] As the Third Circuit recog-

[2] Petitioner suggests (Pet. 14) that the facts showed that the government was attempting to distort the fact finding process because it granted immunity to 14 prosecution witnesses, but was unwilling to grant immunity to the five defense witnesses. The two groups, however, are not comparable. All but three of the 14 witnesses to whom petitioner refers had entered into plea agreements and were no longer potential targets of prosecution. Of the three remaining witnesses, two were low-level employees who cut and packaged heroin for petitioner, and the third had failed to file a currency transaction report with respect to the sale of a boat to petitioner. Those witnesses were clearly distinguishable from the witnesses petitioner sought to immunize. For example, Romero was a drug kingpin.

nized in *Smith*, a defendant "should not be empowered to give his confederates an immunity bath." 615 F.2d at 973.[3]

Petitioner notes (Pet. 11) that the Third Circuit held in *Smith* that a court has inherent authority to immunize witnesses. 615 F.2d at 969. We disagree with that conclusion. The federal immunity statute, 18 U.S.C. 6001 *et seq.*, vests the power to grant immunity in the Executive Branch, not the Judiciary. This Court accordingly has explained that the authority to immunize witnesses "is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983). The corollary of that principle is that "[n]o court has authority to immunize a witness." *Ibid.* Not surprisingly, the great majority of the courts of appeals have held that judges may not immunize defense witnesses without a request from the prosecution.[4]

---

[3] Moreover, in *Smith*, unlike in this case, the prosecutor never explained why she was unwilling to grant immunity. 615 F.2d at 967. That failure was compounded by the fact that the witness at issue was a minor subject to the exclusive jurisdiction of the juvenile authorities, and the juvenile authorities had made clear that they did not object to granting use immunity to the witness. *Ibid.* And in sharp contrast to this case, the testimony that the witness would have given in *Smith* was "highly relevant, and possibly exculpatory." *Id.* at 969.

[4] See, *e.g.*, *United States* v. *Hooks*, 848 F.2d 785, 803 (7th Cir. 1988); *Matteson* v. *King*, 751 F.2d 1432, 1443 (5th Cir. 1985), cert. dismissed, 475 U.S. 1138 (1986); *United States* v. *Pennell*, 737 F.2d 521, 527 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *Autry* v. *Estelle*, 706 F.2d 1394, 1401-1402 (5th Cir. 1983), cert. denied, 465 U.S. 1085 (1984); *United States* v. *Heffington*, 682 F.2d 1075, 1080-1081 (5th Cir.

In light of *Pillsbury Co.* v. *Conboy*, we doubt that the Third Circuit would now conclude that courts have inherent authority to immunize witnesses. But no grant of immunity would be warranted in this case in any event. The Third Circuit made clear in *Smith* that immunity would not be granted where "the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative, or if it is found to relate only to the credibility of the government's witnesses." 615 F.2d at 972. That is essentially the same test that was applied in this case in deciding that the government's refusal to immunize the five defense witnesses did not deny petitioner a fair trial. The due process test used by the Second Circuit in cases in which the prosecutor has refused to immunize a defense witness is whether the refusal is not justified by legitimate prosecutorial interests and whether "the witness's testimony will clearly be material, ex-

---

1982), cert. denied, 459 U.S. 1108 (1983); *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456 U.S. 1008 (1982); *United States* v. *D'Apice*, 664 F.2d 75, 77 (5th Cir. 1981); *United States* v. *Karas*, 624 F.2d 500, 505 (4th Cir. 1980); cert. denied, 449 U.S. 1078 (1981); *United States* v. *Turkish*, 623 F.2d 769, 771-779 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Lenz*, 616 F.2d 960, 962 (6th Cir.), cert. denied, 447 U.S. 929 (1980); *In re Daley*, 549 F.2d 469, 479-480 (7th Cir.), cert. denied, 434 U.S. 829 (1977); *United States* v. *Graham*, 548 F.2d 1302, 1315 (8th Cir. 1977); *United States* v. *Caldwell*, 543 F.2d 1333, 1356 n.115 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087 (1976); *United States* v. *Alessio*, 528 F.2d 1079, 1080-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); see also *United States* v. *Capozzi*, 883 F.2d 608, 613 (8th Cir. 1989), cert. denied, 110 S. Ct. 1947 (1990); *United States* v. *Eagle Hawk*, 815 F.2d 1213, 1217 (8th Cir. 1987), cert. denied, 484 U.S. 1012 (1988); *United States* v. *Hardrich*, 707 F.2d 992, 993-994 (8th Cir.), cert. denied, 464 U.S. 991 (1983).

culpatory, and not cumulative." *United States* v. *Turkish*, 623 F.2d 769, 778 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). Petitioner has failed to show that the witnesses he seeks to immunize would exculpate him. Instead, he has merely made conclusory statements such as that "each defense witness was expected to contradict certain key cooperating witnesses." Pet. 15. Moreover, the witnesses were all targets of active criminal investigations. There was therefore a strong and legitimate prosecutorial interest in not immunizing the witnesses and making their ultimate prosecution more difficult.

A number of courts, including the Second Circuit, have suggested that in extreme instances the government's refusal to immunize a defense witness might give rise to a due process violation. See, *e.g.*, *United States* v. *Angiulo*, 897 F.2d 1169, 1190-1192 (1st Cir. 1990), petition for cert. pending, No. 90-46; *United States* v. *Capozzi*, 883 F.2d 608, 613-614 (8th Cir.), cert. denied, 110 S. Ct. 1947 (1990); *United States* v. *Turkish*, 623 F.2d at 771-779; *People* v. *Adams*, 53 N.Y.2d 241, 247, 440 N.Y.S.2d 902, 904, 423 N.E.2d 379, 381 (1981); *People* v. *Owens*, 63 N.Y.2d 824, 482 N.Y.S.2d 250, 472 N.E.2d 26 (1984); *People* v. *Chin*, 67 N.Y.2d 22, 32, 499 N.Y.S.2d 638, 646, 490 N.E.2d 505, 515 (1986). See also *United States* v. *Hooks*, 848 F.2d 785, 801-803 (7th Cir. 1988). No court, however, has ever reversed a conviction on that basis. Moreover, the courts that have discussed the due process issue have made clear that reversal on that ground would be appropriate only in cases where the balance of interests was far more compelling in the defendant's favor than in this case. Thus, the decision in this case does not conflict with the decision of any other court of appeals or any state court.

2. Contrary to petitioner's contention (Pet. 15-16), the district court properly refused to permit petitioner's expert witness, private investigator Edward Seidlick, to interpret words and phrases used in tape-recorded conversations that had not been introduced into evidence. First, petitioner has not shown how the conversations are relevant. Second, Seidlick was not competent to introduce the tapes. He was not a party to the conversations; nor could he verify their accuracy and authenticity. Moreover, to the extent that the conversations did not involve discussions of petitioner's narcotics business but were introduced to prove the truth of the matters asserted, they were hearsay. Because the government could not cross-examine petitioner about the statements, they were properly excluded. Petitioner has not proffered a theory under which those recordings should have been admitted. Accordingly, he has not shown that the district court abused its discretion in excluding them.

3. Finally, petitioner argues (Pet. 16-17) that the district court should have ordered the government to unseal the sealed tapes during trial and make new copies from them. That argument is wholly without merit. The government provided a copy of all the intercepted conversations to petitioner two months before trial. Subsequently, the government provided a corrected copy of the one faulty tape that had been supplied to petitioner, and it offered to correct any other problem petitioner identified from a comparison of the tapes with the log. But petitioner identified no additional problems. The district court acted well within its discretion in denying petitioner's motion that the government comply with his burdensome request where petitioner could do no more than offer

the groundless speculation that "there may be exculpatory information on the original tapes." Pet. 17.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

AUGUST 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 20039